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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 334

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 24–37) is reported at 342 F. 2d 538. The Board's Decisions and Orders (1 J.A. 1–26, 2 J.A. 1–31) [1] are reported at 147 NLRB 1317 and 147 NLRB 1243.

[1] Two cases, one involving the Union's picketing in the Port of Philadelphia and the other involving its picketing at Houston and Galveston, were consolidated in the court of appeals and docketed as Numbers 29067 and 29068, respectively. "1 J.A." refers to the Joint Appendix in No. 29067. "2 J.A." refers to the Joint Appendix in No. 29068.

JURISDICTION

The decrees of the court of appeals were entered on April 9, 1965 (Pet. 38–41). The Union's petition for rehearing was denied on April 12, 1965. The petition for a writ of certiorari was filed on July 9, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board has jurisdiction to prevent an unfair labor practice arising out of an inter-union controversy concerning representation.

2. Whether the protection afforded neutral employers by Section 8(b)(4)(B) of the Act covers a situation where the union's ultimate dispute is with another union, rather than with another employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 21–23 of the petition and p. 8, n. 5, *infra*.

STATEMENT

A. *The Board's findings of fact.* The present cases arise out of a dispute concerning representation of employees on the *S.S. Maximus* between the Marine Engineers Beneficial Association (MEBA) and the Seafarers International Union (SIU) on the one hand, and the National Maritime Union (NMU), petitioner here, and its affiliate, the Brotherhood of Marine Officers (BMO), on the other. In June 1963, the *Maximus,* which the Grace Line recently had sold to Cambridge Carriers, arrived in the Port of Phila-

delphia to take on cargo. When Grace owned the *Maximus,* it had been manned by members of MEBA. After the vessel was sold to Cambridge Carriers, the MEBA engineers were replaced by members of BMO. On June 10, 1963, MEBA began to picket the *Maximus* with signs characterizing Cambridge Carriers as unfair to MEBA engineers. In retaliation, NMU established picket lines at various piers in the ports of Philadelphia, Houston and Galveston, where ships with MEBA members in their crews had docked. Similar "response" picketing of MEBA-manned ships occurred in the Port of New Orleans.[2]

In Philadelphia, NMU picketing began on June 14, 1963, at the pier where the Weyerhaeuser ship *George S. Long,* manned by MEBA engineers, was moored. On June 19, the picketing was extended to cover the *Portmar,* owned by Calmar Steamship Corporation and also manned by MEBA engineers (1 J.A. 11–12, 37–38, 40, 43–44, 45, 53, 58, 64, 74–75, 105–106). The picketing continued through June 20 (1 J.A. 12, 39, 42, 74, 76, 91–92). The pickets carried signs which read, "Information Picketing MEBA Engineers Interfere with Employers Who Lawfully Recognize N.M.U." (see 1 J.A. 11, 57). The pickets and other NMU agents distributed leaflets addressed "To all union men." The leaflet stated that MEBA was

[2] The New Orleans picketing was found unlawful by the Board in a decision reported at 147 NLRB 1328 (1 J.A. 132–158). On April 15, 1965, the Court of Appeals for the District of Columbia Circuit enforced the Board's order in that case. The court's decision is printed at pp. 42–59 of the petition, and discussed at pp. 10–11, *infra.*

picketing the *Maximus* because "it wants the jobs of the NMU and BMO members." Another portion of the leaflet stated: "We want the shipowners and the stevedoring companies to know that if they can't stand up to outfits that try to put pressure on them in a phony beef, then they're really going to be in trouble" (1 J.A. 11–12, 44, 45, 127).

From June 14 to June 19, Nacirema Operating Co., a corporation performing stevedoring services in Philadelphia for Calmar and Weyerhaeuser, ordered gangs of longshoremen to unload the *George S. Long*, but the men refused to cross the picket line (1 J.A. 12, 94–95, 100, 113–114). Similarly, on June 19 and 20, the day and night gangs ordered by Calmar's port agent to work on the *Portmar* refused to cross NMU's picket line (1 J.A. 12, 70–71). On June 18, 19 and 20, Hinkins Steamship Company, Weyerhaeuser's agent for soliciting and receiving cargo, requested that the picket line be moved, but picket Captain Jardine and NMU Port Agent Parise rejected the requests (1 J.A. 14–15, 99–101, 101–102, 104, 106–107). Similarly, on June 19 and 20, Calmar's agent made numerous requests of Jardine and Parise to move the pickets so that clerks and checkers, members of International Longshoremen's Association (ILA), could go to work, but these requests were also rejected, and none of the clerks and checkers crossed the line (1 J.A. 15–16, 65–66, 68–69, 73, 76–77, 78, 86).

On June 17, 1963, NMU began to picket in Houston and Galveston (2 J.A. 2, 15). The pickets carried signs identical with those used in Philadelphia (2

J.A. 16, 62, 71, 113, 115, 117) and distributed leaflets which were substantially the same as those used in Philadelphia (2 J.A. 5, 16, 48, 56–57, 119).

At the Navigation District wharves in Houston,[3] picketing took place on June 18, 19, and 20 at the entrance gates normally used by stevedoring company and Navigation District personnel who are members of the ILA, and by truckers making deliveries (2 J.A. 15, 45, 53). During the picketing, employees from ILA locals were ordered to work on the eight ships berthed at Navigation District piers, but the men refused to cross the picket line and all the ships were idled (2 J.A. 2, 15, 46–50, 54–55). Picketing occurred at the main gate of the Long Reach docks in Houston from June 17 through June 20. There were eight ships at the docks at this time, and no work of any kind was done by any employees during the period of the picketing (2 J.A. 15–16, 61–66).

At Galveston, the picketing followed a pattern similar to that at Houston. Delta Steamship Lines' vessel, *Del Alba,* arrived at Pier 35 on June 16 with a cargo of raw sugar (2 J.A. 16–17, 70), and NMU picketed that pier on June 17 and 18. No longshoremen crossed the line and the vessel was not unloaded (2 J.A. 16–17, 70–74).

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[3] In Houston, most of the wharves, warehouses and other marine terminal facilities are operated by Harris County-Houston Ship Channel Navigation District ("Navigation District") (2 J.A. 12, 14, 41). Gulf Atlantic Warehouse Company also operates a marine terminal in Houston known as the "Long Reach" docks (2 J.A. 12, 58–59).

NMU did not have a dispute with any employer at any of the docks it picketed in Philadelphia, Houston or Galveston (1 J.A. 2; 2 J.A. 5, 58, 63, 66, 67, 70, 74, 77). It did not use the newspaper or radio to publicize its dispute with MEBA (2 J.A. 92, 102) and did not picket MEBA headquarters in Galveston or Houston (2 J.A. 91, 95, 102). NMU officials did not inform the ILA rank-and-file or any ILA official that it would be all right for ILA members to cross the picket lines (2 J.A. 95, 102, 107). NMU's Houston port agent, McDowell, was aware that the picketing was causing work stoppages at the port and so informed NMU headquarters in New York. He received no instructions to alter the method of picketing so as to alleviate the work stoppages (2 J.A. 106).

On June 20, Port Agent McDowell learned that the Secretary of Labor had arranged a settlement of the dispute in Philadelphia concerning the *Maximus*. McDowell announced to newspaper reporters, "I have just called off my pickets, and as far as I am concerned the port can get back into operation" (2 J.A. 6, 17, 105, 109–111).

B. *The Board's conclusions and order.* Upon the foregoing facts, the Board concluded that NMU had violated Section 8(b)(4)(B) of the Act. The Board found that NMU had induced and encouraged employees of Weyerhaeuser, Calmar, Nacirema and Hinkins to strike and had restrained and coerced those neutral employers, with an object of forcing them to cease doing business with each other or with any other person at Pier 27 in the Port of Philadelphia (1 J.A.

1–2, 22–24). The Board further found that NMU had induced and encouraged employees of various employers, including the Navigation District, Gulf Atlantic Warehouse Company, Delta Steamship Lines and employer-members of Houston Maritime Association, to strike and had restrained and coerced those neutral employers, with an object of forcing them to cease doing business with each other and with other employers and persons engaged in commerce (2 J.A. 6, 25–26). The Board ordered NMU to cease and desist from the unfair labor practices found, and to post appropriate notices (1 J.A. 3–5, 24–25; 2 J.A. 6–9, 26–28).

C. *The court of appeals' decision.* The court of appeals sustained the Board's findings and enforced its orders (Pet. 24–37).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. There is thus no occasion for further review.

Section 8(b)(4)(i)(ii)(B) of the Act makes it an unfair labor practice for a labor organization "to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment * * * to perform any services," or "to threaten, coerce, or restrain any person," where "an object" is "forcing or requiring any person * * * to cease doing business with any other person * * *." On the findings of the Board, approved by the court below (see Statement, *supra*, pp. 6–7), it is clear that NMU's picketing violated the

literal terms of this provision.[4] Nevertheless, petitioner contends (1) that the Board was without jurisdiction because the underlying controversy did not constitute a "labor dispute" within the meaning of Section 2(9) of the Act, and (2) that there could be no "secondary boycott" since the real dispute was with another union and not with a "primary employer." The court below properly rejected both contentions.

1. Section 2(9) of the Act defines the term "labor dispute" "*[w]hen used in this Act*" (emphasis added). But that term is not used in Section 8(b)(4)(B) or in the broad jurisdictional provision of Section 10(a).[5] Thus the Board's jurisdiction over unfair labor practices is nowhere made expressly dependent upon the existence of a "labor dispute" as defined in Section 2(9). But even assuming such a requirement were implicit in the Act, the court below correctly concluded that a "labor dispute" was involved in the present case. Section 2(9) (Pet. 21) defines "labor dispute" to include "any controversy * * * concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seek-

[4] Petitioner's statement (Pet. 4, n. 2) that both the Board and court below conceded that NMU's objective in picketing was legal and proper is incorrect. As the court below observed (Pet. 27), the Board found only that NMU's *ultimate* object—protecting itself in a representation dispute with a rival union—was lawful; it found, however, that the immediate object of the picketing was to exert economic pressure on neutral employers by causing a cessation of business—"an object" which is proscribed by Section 8(b)(4)(B) of the Act.

[5] Section 10(a) provides that:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

ing to arrange terms or conditions of employment." The ultimate object of NMU's picketing was to preserve its right to represent the employees on the *Maximus* and to administer the collective bargaining agreement which it had obtained covering those employees against the rival claim asserted by MEBA. As NMU explained the dispute to its own members, its action was taken to defend the principle—with which MEBA allegedly was not in accord—that "if [a ship] is sold to an unorganized company, it becomes a legitimate organizing objective for any union" (1 J.A. 129). This Court has consistently held that such a conflict between unions over matters of representation or jurisdiction constitutes a "labor dispute" within the definition in Section 2(9).[6] The cases cited (n. 6, *supra*) may not be fairly distinguished on the ground that they involved the Norris-LaGuardia Act (Pet. 11–12).[7] Section 13(c) of that Act contains virtually the same definition of "labor dispute" as Section 2(9) of the NLRA. Section 13(a) of the Norris-LaGuardia Act, which makes specific reference to inter-union disputes, merely illustrates the kind of cases which "shall be held to involve or to grow out

[6] See, *e.g.*, *Milk Wagon Drivers' Union* v. *Lake Valley Farms Products, Inc.*, 311 U.S. 91, 99–100; *United States* v. *Hutcheson*, 312 U.S. 219; *Fur Workers' Union, Local No. 72* v. *Fur Workers Union, No. 21238*, 105 F. 2d 1 (C.A.D.C.), affirmed, 308 U.S. 522. See also *Green* v. *Obergfell*, 121 F. 2d 46 (C.A.D.C.); *Teamsters* v. *Brewery Workers*, 106 F. 2d 871 (C.A. 9).

[7] It is quite natural that precedents on this issue would be found in Norris-LaGuardia Act cases since the operative provisions of that Act, unlike Section 10(a) of the NLRA (n. 5, *supra*), depend upon the existence of a "labor dispute." See Sections 1, 4–10, 29 U.S.C. 101, 104–110.

of a labor dispute"; it does not alter the general definition of "labor dispute" contained in Section 13(c) (Pet. 28–29).

Contrary to petitioner's contention (Pet. 8–10), the decision below does not conflict with *National Labor Relations Board* v. *International Longshoremen's Ass'n* (*Tulse Hill*), 332 F. 2d 992 (C.A. 4). In that case the Board found that the union's boycott of ships which had been used in trade with Cuba was an unfair labor practice and ordered it to cease and desist. The court of appeals denied enforcement of the Board's order for two reasons. First, the Fourth Circuit found that, since ILA's conduct in implementing a policy calculated to eliminate trade with Cuba was not based on a controversy grounded in "terms and conditions of employment," there was no "labor dispute" but only a political question which the Act did not reach (*id.* at 995–996). Second, it found that, in any event, ILA's action did not amount to restraint or coercion of neutral employers for any object proscribed by Section 8(b)(4)(B) (*id.* at 996–999). In contrast, the court below found no occasion to consider what would follow if there were no "labor dispute" since it concluded (Pet. 29) that the present case presents an ordinary conflict over representation and jurisdiction between competing unions which "comes well within the statutory definition" of that term. Moreover, the court found that NMU conducted its picketing by the means, and for an objective, proscribed by Section 8(b)(4)(B).

Nor does the decision below conflict with that of the District of Columbia Circuit in the related case

involving NMU's picketing in New Orleans (n. 2, *supra;* Pet. 12–13). Like the court below, the District of Columbia Circuit was not required to reach the question whether the Board would have had jurisdiction in the absence of a labor dispute, and it expressly pretermitted that issue (Pet. 50). Also like the court below, that court found that, unlike in *Tulse Hill,* the union's activity satisfied the means and object requirements of Section 8(b)(4)(B) (Pet. 49–50, 52, 56).

2. Petitioner's second argument is likewise without merit. There is no justification for restricting Section 8(b)(4)(B) to the situation where the union's underlying dispute is with a primary employer rather than with another union. In enacting that Section, Congress' purpose was to shield "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 692. As the court below noted (Pet. 32–33), "[s]econdary economic pressure generated in a controversy over representation or jurisdiction has no less an impact on neutral employers than where secondary activity is resorted to in furtherance of a dispute with a primary employer." Moreover, contrary to petitioner (Pet. 14–16), the legislative history confirms that Congress intended to prohibit secondary pressure, not only when used in furtherance of a dispute with a primary employer, but also when used in furtherance of inter-union jurisdiction or representation disputes. See the history cited in the

decision of the District of Columbia Circuit in the case involving NMU's picketing in New Orleans (Pet. 50–51, n. 8; 54–55, n. 12).[8]

Petitioner is not aided by its reliance (Pet. 16–19) on *Douds* v. *International Longshoremen's Ass'n*, 224 F. 2d 455 (C.A. 2), certiorari denied, 350 U.S. 873,[9] in which the Second Circuit held that Section 8(b)(4) proscribed secondary activity only if the union's ultimate object, and not merely its intermediate object, was to force a cessation of business relations (*id.* at 459–460). Even if applicable to the facts of this case, that decision is no longer an authoritative precedent. As the Second Circuit pointed out in declining to follow *Douds* here (Pet. 35–36), the "lawful ultimate object theory" of that case is at odds with the language of the statute, the holding of this Court in *National Labor Relations Board* v. *Denver Building & Construction*

[8] There is no substance to petitioner's contention (Pet. 19–20) that the fact that Congress dealt with the subject of inter-union disputes in Sections 8(b)(4)(D) and 10(k) of the Act shows that Section 8(b)(4)(B) was not intended to reach such disputes. Section 8(b)(4)(D) interdicts both primary and secondary pressure to force an employer to assign work to one group of employees rather than to another group of employees. Section 8(b)(4)(B), on the other hand, interdicts only secondary pressure for a different object, *i.e.*, to force a cessation of business relations. See *Local No. 5, United Association of Journeymen, etc.* v. *National Labor Relations Board*, 321 F. 2d 366, 371 (C.A.D.C.), certiorari denied, 375 U.S. 921.

[9] In *Douds*, the court reversed a contempt citation against an independent longshoremen's union which had refused to handle goods carried by AFL truckers. The truckers had honored the picket line of a rival longshoremen's union which was contesting with the independent union for the right to represent the employees of the company to which the truckers were making deliveries.

Trades Council, 341 U.S. 675, 689, and the consistent trend of subsequent court of appeals decisions in other circuits as well as in the Second Circuit.[10] The decision of the District of Columbia Circuit in the related case involving NMU's picketing in New Orleans is in accord with that of the court below on this point (Pet. 56–57).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 1965.

[10] The court below also pointed out (Pet. 34–35) that the situation in *Douds* was a special one, and that many of the difficulties which the court sought to avoid by its decision in that case were cured by the 1959 amendments to Section 8 (b) (4) and by the enactment of Section 8(b) (7).

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